STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 9, 2014
v	No. 312456 Saginaw Circuit Court
SCOTT LOUIS KOHLHOFF, Defendant-Appellant.	LC No. 11-035905-FH

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of criminal sexual conduct, third degree (CSC III), MCL 750.520d(1)(a) (victim age 13-15), as an alternative to the charged offense of CSC I, MCL 750.520b(1)(f) (use of force causing injury, digital penetration). Defendant was sentenced to serve 48 months to 15 years in prison. For the reasons that follow, we affirm.

I. TRIAL ISSUES

Defendant first argues that the trial court erred in overruling his objection to the prosecutor referring to the complainant as "victim" because, until the verdict, the complainant was only an alleged victim. This ruling, according to defendant, shifted the burden of proof onto him to prove the complainant was not a victim.

The Sixth Amendment right to a fair trial guarantees that guilt is based on the evidence introduced at trial and "not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002) (quotation marks and citation omitted); see US Const, Am VI. The burden of proof may shift when the prosecutor infers that a defendant must prove something. *People v Heath*, 80 Mich App 185, 188; 263 NW2d 58 (1977).

Although the Court in *People v Stanaway*, 446 Mich 643, 677-678 n 37; 521 NW2d 557 (1994), did state that "the legal status of an accuser as victim does not obtain until a conviction is entered," the Court was weighing the right to confidential records under the sexual assault counselor-victim privilege of MCL 600.2157a(2) against a defendant's due process right to question an accuser's credibility. *Stanaway*, 446 Mich at 655-656, 676-678. The *Stanaway*

Court referenced a victim's legal status, and was not considering whether it was proper to refer to complainant as a "victim" in front of a jury.

Here, the prosecutor referred to the complainant as the victim in its opening statement, twice when questioning the sexual assault nurse, and once while questioning a detective. The prosecutor did not use the term in closing argument. Under the sexual conduct section of the criminal code, the complainant's legal status was that of a victim. MCL 750.520a(s) defines a victim as "the person *alleging* to have been subjected to criminal sexual conduct." By definition, therefore, the complainant was a victim.

And, even if error, any resulting prejudice was cured by the court's jury instructions. See *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The trial court instructed the jury that defendant was presumed to be innocent and should be found not guilty unless the evidence proved beyond a reasonable doubt that he was not. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, even if defendant was denied his Sixth Amendment rights, reversal is not required if the error is harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131-132; 687 NW2d 370 (2004). "An error is harmless beyond a reasonable doubt when it has had no effect on the verdict." *People v Morton*, 213 Mich App 331, 335; 539 NW2d 771 (1995). Given the testimony of the victim that defendant penetrated her with his finger, and the physical evidence of vaginal bruising, any error was harmless.

Defendant next argues that his right to confront his accuser was violated when he was prohibited from questioning the complainant about her history of sexual acts to demonstrate her lack of credibility. The trial court found that the rape-shield statute prohibited defendant from questioning the complainant about her history of sexual acts, and there was no exception to the rape-shield act for credibility inquiries.

A trial court's decision on an evidentiary issue will be reversed on appeal only when there has been an abuse of discretion. *People v Holtzman*, 234 Mich App 166, 190; 593 NW2d 617 (1999). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Whether a defendant was denied the constitutional right to present a defense is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

MCL 750.520j provides, as follows:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In promulgating the rape-shield statute, the Legislature considered "the evidentiary principle of balancing probative value against the dangers of unfair prejudice, inflammatory testimony, and misleading the jurors to improper issues." *People v Adair*, 452 Mich 473, 483; 550 NW2d 505 (1996). The Legislature determined that with respect to a CSC victim's prior sexual activity, "the balance overwhelmingly tips in favor of exclusion as a matter of law," *id*., because evidence of a rape victim's sexual conduct with people other than the defendant, as well as the victim's sexual reputation, "is neither an accurate measure of the victim's veracity nor determinative of the likelihood of consensual sexual relations with the defendant" in the overwhelming majority of prosecutions. *People v Morse*, 231 Mich App 424, 430; 586 NW2d 555 (1998) (quotation marks and citation omitted). "In the vast majority of cases," evidence of a rape victim's prior sexual acts with others offered for general impeachment is inadmissible. *People v Hackett*, 421 Mich 338, 347-348; 365 NW2d 120 (1984). A trial court should respect the significant legislative purposes underlying the rape-shield statute and should favor exclusion of evidence of a complainant's sexual conduct provided defendant's right to confrontation is not abridged. *People v Benton*, 294 Mich App 191, 197-198; 817 NW2d 599 (2011).

Defendant wished to introduce evidence that the complainant had been sexually active prior to the night of the charged incident. On a record outside the presence of the jury, the complainant testified that she falsely told the interviewing detective and the Child Advocacy Center that she was not sexually active prior to the incident. The trial court found the evidence inadmissible after ascertaining that the complainant was not sexually active within 48 hours of the incident with defendant and was not injured in any way other than from sexual contact.[1] This testimony was precisely the sort of evidence the Legislature decided to exclude. "Evidence of specific instances of the victim's sexual conduct" is plainly excluded by MCL 750.520j(1), and the offered evidence did not meet either of the exceptions to the statute.

However, defendant argues that the right to confront a witness controls over the rape-shield law. A defendant has a Sixth Amendment right to confront his or her accusers. US Const, Am VI; Const 1963, art 1, § 20. In limited circumstances, evidence that is not admissible under one of the rape-shield statute exceptions may be relevant and admissible to preserve a defendant's Sixth Amendment right of confrontation. *Hackett*, 421 Mich at 344, 348; *Benton*, 294 Mich App at 197-198. A primary interest secured by the Confrontation Clause is the right of cross-examination, which guarantees a defendant a "reasonable opportunity to test the truth of a witness' testimony." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (citations omitted); see also *Hackett*, 421 Mich at 347. The credibility of witnesses is critical and always relevant. *Powell v St. John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000); *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990).

[1] The treating physician testified that the extensive bruising around the complainant's vagina occurred within 48 hours of complainant's examination.

However, the right of cross-examination may "bow to accommodate other legitimate interests of the trial process or of society," and a trial judge has wide latitude within the Confrontation Clause to impose reasonable limits on cross-examination. *Adamski*, 198 Mich App at 138. For example, in *Morse*, 231 Mich App at 434 (quotation marks and citation omitted), the Court found a narrow exception to the rape-shield statute under the Confrontation Clause that permitted introduction of "evidence of a child witness's prior sexual conduct . . . to rebut the inferences that flow from a display of unique sexual knowledge." In *Hackett*, 421 Mich at 348-349, the Court reviewed instances where evidence of a complainant's prior sexual conduct was admissible under the Confrontation Clause for the purpose of showing the complainant's bias, for demonstrating a complainant's ulterior motive for making a false charge, and to prove that the complainant made previous false accusations of rape. None of these Confrontation Clause exceptions apply to the instant case.

Defendant's interest in demonstrating that the complainant was not truthful with investigators regarding her previous sexual experience was not significantly related to her accusations. The evidence may have had some value regarding the complainant's general candor, but she never testified in front of the jury that she did not previously have sexual experiences, and defendant was able to demonstrate that her initial statement to police about her alcohol consumption was false.

Defendant's next argument is that the trial court erred in allowing a police detective to testify about the attributes of sexual abuse victims. According to defendant, the witness was not an expert in sexual assault victims, and his testimony was too general to be of use as lay opinion. In addition, as a detective, the witness's testimony was likely given undue weight by the jury.

A trial court's decision on an evidentiary issue will be reversed on appeal only when there has been an abuse of discretion. *Holtzman*, 234 Mich App at 190. The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

MRE 702 provides for the admission of expert opinion "[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue . . ." and "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." In order to determine whether expert testimony is admissible under MRE 702, a searching inquiry is mandated. The inquiry is "not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Gilbert v DaimlerChrysler Co*, 470 Mich 749, 782; 685 NW2d 391 (2004).

The prosecutor asked Detective Kerns about his observations of people in a "state of shock" and the behavior of crime victims in a "state of shock." Kerns also provided his observations about the differences, according to age, of victims who were in shock, including that assault victims did not like to talk and that teenage assault victims tend to have concerns about getting into trouble. In closing argument, the prosecutor stated that the complainant woke up the morning after the assault behaving "shocky," as in a reaction to trauma. Defendant argues

that Kerns's testimony was impermissible expert testimony because he was not qualified to offer his opinion on the general proclivities of sexual assault victims.

An expert's opinion testimony is "limited to the expert's area of expertise." *People v Jones*, 95 Mich App 390, 394; 290 NW2d 154 (1980). Here, plaintiff was not attempting to qualify Kerns as an expert in the "general proclivities of assault victims" or in "reasons for a delay in reporting in a sexual assault case." Instead, Kerns was asked about his personal observations of crime victims in a state of shock, and the trial court allowed the testimony on the basis that it was an opinion based on witness perception that was helpful to facts at issue. See, MRE 701; *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995). And although he was not providing expert testimony, Kearns testimony was not concerning matters of common knowledge. See *In re Blackwell Estate v Hare*, 50 Mich App 204, 209; 213 NW2d 201 (1973), rev'd on other grounds 391 Mich 798 (1974). The trial court's ruling was not an abuse of discretion.

Defendant also argues that the trial court erred in allowing the prosecution to amend the information during trial to include alternative counts of CSC III. We review a trial court's decision to grant a motion to amend the information for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

A trial court may amend an information at any time before, during, or after trial. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998). However, the charging document may not be amended where it infringes a "defendant's right to be fairly apprised of the charge against him." *People v Newson*, 173 Mich App 160, 164; 433 NW2d 386 (1988), vacated in part on other grounds in 437 Mich 1054 (1991). Further, when an amendment to the information charges a new crime, a defendant's right to receive a preliminary examination may be violated. *People v Jones*, 252 Mich App 1, 5; 650 NW2d 717 (2002).

The Court explained circumstances where amending the information was not permissible in *People v Adams*, 202 Mich App 385, 391-392; 509 NW2d 530 (1993):

> [W]e conclude that where a prosecutor seeks to add a cognate lesser included offense that is dissimilar to the charged offense, and the information does not suggest the need to prepare a defense against that cognate lesser included offense, and notice to the defendant does not come until after the prosecutor begins to present evidence, the trial court should not grant the prosecutor's request for an instruction on that cognate lesser included offense.

A trial court may permit amendment of the information to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *Unger*, 278 Mich App at 221.

MCL 767.76 provides in part:

> *The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence.* If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. . . . No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor[e] and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted. [Emphasis added.]

Here, defendant was charged with two counts of CSC III (victim age 13 through 15), MCL 750.520d(1)(a). At the end of the preliminary examination, the prosecutor asked the district court to bind over defendant on two counts of CSC I, MCL 750.520b(1)(f) (use of force causing injury), and defendant was bound over to the circuit court on amended charges of two counts of CSC I. Where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, "the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial." *Goecke*, 457 Mich at 462; see also *Unger*, 278 Mich App at 222; *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005). Additionally, the amended information added only an element of age that defendant had to defend against. Defendant does not establish how he was placed at an unfair advantage by having to defend against the complainant's birth date, which was never in dispute. See *People v Hunt*, 442 Mich 359, 364-365; 501 NW2d 151 (1993).

Defendant also asserts that he was denied a fair trial by various statements made by the prosecutor during closing argument, including: (1) intentionally interjecting her opinion regarding the truthfulness of the complainant's testimony and encouraging the jury to convict based on her personal beliefs; (2) suggesting that defendant was required to prove that he did not injure the complainant (and thus impermissibly shifting the burden of proof); and (3) disparaging defendant's counsel by suggesting that counsel was misleading the jury. In the same vein, defendant argues that his trial counsel was ineffective in failing to object to the improper comments, which resulted in defendant's conviction.

Unpreserved issues are reviewed for plain error that affected defendant's substantial rights. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the guilt or innocence of the accused." *Id.* at 473.

"[A] claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The responsibility of a prosecutor is to seek justice, rather than merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The test of prosecutorial misconduct is "whether a defendant was denied a fair and impartial trial." *Id*. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the defendant. *Id.* at 63-64. Claims of prosecutorial misconduct are reviewed "on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial" resulting in prejudice to defendant. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010).

"A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully." *Rodriguez*, 251 Mich App at 31. Such commentary could influence the jury to decide the case based on the prosecutor's special knowledge and not on the evidence presented. *People v Bennett*, 290 Mich App 465, 476-477; 802 NW2d 627 (2010), citing *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Defendant argues that the following statement made by the prosecutor in closing remarks constituted improper vouching: "This is not a kid who wants to lie. This is not a kid who wants a lie to stand. This is a girl who wants to tell you what happened." However, defendant advanced the theory that the complainant's story was a falsehood, and the prosecutor's comments were responsive to this theory of the case. See *Fyda*, 288 Mich App at 462. Moreover, a prosecutor may comment on the credibility of its own witness during closing argument, "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

As to the statement, "This was not [the complainant] telling a lie, and it's insulting to everyone's intelligence to suggest that it's complainant telling a lie," the prosecutor was not referencing a personal opinion on the complainant's truthfulness. Rather, the statement came in the context of responding to defendant's theory that the complainant's medical report was not consistent with her other reports.

Similarly, the statement, "I can't say there's DNA evidence linked to him. What I can say is [the complainant] said it was him. She's got no reason to lie. She's proven herself to be a person who can't let a lie stand," was not one in which the prosecutor was asserting personal knowledge of the complainant's veracity. Rather, the prosecutor was commenting on evidence that no DNA was found on the complainant's underwear and evidence that she quickly retracted her lie to police about alcohol consumption.

Defendant also argues that the prosecutor improperly shifted the burden of proof to defendant when she stated, "It makes no sense that [the complainant] went to the party with this

injury. She already had it? Who caused it? Who caused it?" Although a "prosecutor may not suggest in closing argument that [a] defendant must prove something or present a reasonable explanation for damaging evidence" because this tends to shift the burden of proof, *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), the prosecutor's comment was responding to defense counsel's argument that the evidence "shows that somebody else must have done these damages." *Fields*, 450 Mich at 115 ("[O]nce the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof."). Further, the prosecutor later stated that "[d]efense doesn't have to do a thing. They don't have to put a single witness on," and the court instructed on the burden of proof: "The defendant is not required to prove his innocence or to do anything."

Defendant also argues that the prosecutor committed misconduct by denigrating defendant's trial counsel. Defendant states that the prosecutor was attempting to mislead the jury and criticized defense counsel's character when arguing that:

> The defense spent a lot of time in this trial dripping little red herrings for you to be able to go over here. This is the I don't care what happened to this girl defense. This is her fault. Okay? They want you to not care about her so that you can go back there and say, well, you know, we don't care about her because, you know, she's kind of a little whore.
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> * * *
>
> Here's the . . . kind of things they dropped in. Bellybutton ring. Remember that? Came out of nowhere. Came out of the sky. No one talked about that. All of the sudden, apropos of nothing, comes the bellybutton ring. What's that all about? Her fault. Okay?

Prosecutors may not argue that defense counsel intentionally attempted to mislead the jury because it indicates that defense counsel does not believe his own client. *Fyda*, 288 Mich App at 461. Nor may a prosecutor personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), and in so doing divert the jury's attention from the evidence, *Unger*, 278 Mich App at 236.

However, a prosecutor's remarks must be read in context "because an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Defendant elicited testimony regarding the outfit the complainant was wearing, that the complainant was wearing lacy underwear, that she had a bellybutton ring, and had used intoxicating substances the night of the sexual assault. Defendant's counsel mentioned complainant's lace underwear and substance use in closing argument, and the prosecutor's comments were properly responsive to this evidence and argument. The prosecutor's comments may have been colorful, but "[t]he prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66.

In the alternative, defendant briefly argues that his trial counsel was ineffective in failing to object to the prosecutor's remarks. A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Here, the remarks of the prosecutor were not improper, so trial counsel was not ineffective for failing to make futile objections. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007).

Another argument put forward by defendant is that the trial court erred in refusing defendant's request for jury instructions on several lesser-included offenses. According to defendant, the evidence supported that he could have been charged with assault with intent to commit criminal sexual penetration because the jury may not have believed that he sexually penetrated the complainant. Further, defendant argues, the jury should have been instructed on CSC II, CSC IV, and assault with intent to commit CSC II. This Court reviews de novo a trial court's ruling on a necessarily included lesser offense instruction. *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005); *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004).

MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

An inferior-offense instruction is appropriate where the lesser offense is necessarily included in the greater offense and a rational view of the evidence would support such an instruction. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). A necessarily included lesser offense is where "all the elements of the lesser offense are included in the greater offense[.]" *People v Nickens*, 470 Mich 622, 632; 685 NW2d 657 (2004) (internal quotation marks and citation omitted). Lesser offense instruction is proper where "'the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.'" *McGhee*, 268 Mich App at 607, quoting *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Defendant was charged under MCL 750.520b(1)(f), which occurs where "the actor (1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration." *Nickens*, 470 Mich at 629. The two prongs of assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1), are "always satisfied" when a defendant commits CSC I under MCL

750.520b(1)(f).[2] *Nickens*, 470 Mich at 631. Thus, assault with intent to commit CSC involving sexual penetration is a necessarily included lesser offense of MCL 750.520b(1)(f).

Therefore, a lesser included offense instruction was appropriate, provided "a rational view of the evidence" would support such an instruction. *Mendoza*, 468 Mich at 541. The evidence must be sufficient, "more than a modicum," that defendant could have been convicted of the lesser offense. *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). The trial court found that the evidence would not support an instruction for assault with intent to commit CSC involving sexual penetration.

Here, a rational review of the evidence did not support the requested instruction. The complainant testified that defendant penetrated her digitally and with his penis. She reported pain, scratches, and blood in her underwear requiring medical treatment. The emergency room physician found unusually extensive bruising on both sides of the complainant's vagina, and her skin was scratched in the area.

Defendant also argues that the trial court should have given instructions on CSC II and attempt to commit CSC II, as lesser included offenses to CSC I, and CSC IV, as a lesser included offense to CSC III. The trial court did not allow the instructions for CSC II and attempt to commit CSC II because it found that those offenses were cognate lesser offenses to CSC I, and did not allow instruction on CSC IV because it was a cognate lesser offense of CSC III.

"[C]ognate lesser offenses contain at least one element not contained within the greater charge[.]" *People v Nyx*, 479 Mich 112, 123; 734 NW2d 548 (2007) (opinion by TAYLOR, C.J.). In *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997), the Court determined that CSC II was a cognate lesser offense of CSC I because it was possible to commit CSC I without having committed CSC II. The Court reasoned that CSC II contained proof of intent that the defendant intended to seek sexual arousal or gratification with sexual contact, an intent not required by CSC I with sexual penetration. *Id.*[3]; see also MCL 750.520b; MCL 750.520c(1). Thus, the trial court did not err in refusing to provide instructions for CSC II and attempted CSC II.

Similarly, CSC IV is a cognate lesser offense of CSC III, because CSC IV involves sexual contact and CSC III involves sexual penetration. MCL 750.520d; MCL 750.520e.

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[2] The two prongs of MCL 750.520g(1) are an assault and an intent to commit CSC involving sexual penetration. *Nickens*, 470 Mich at 631.

[3] Following the *Lemons* decision, the CSC II statute was amended to include three other possible intents included in a CSC II: "an intentional touching in a sexual manner for revenge, or to inflict humiliation, or out of anger." *Nyx*, 479 Mich at 118 n 14 (opinion by TAYLOR, C.J.) (quotation marks omitted); see MCL 750.520a(q).

Moreover, a rational review of the evidence did not support a finding that sexual penetration did not occur. CSC II and CSC IV involve sexual contact rather than sexual penetration of the charged offenses of CSC I and CSC III. The evidence supported that penetration, rather than sexual contact, occurred.

Defendant argues that no binding authority has answered whether CSC II is a necessarily included lesser offense of CSC I. Defendant bases this argument on *Nyx*, 479 Mich 112. In *Nyx*, 479 Mich at 134, 142-144, 146-150, 154-155, 161-165, three Justices agreed that CSC II was a necessarily included lesser offense of CSC I and would overrule *Lemons*. However, a majority in *Nyx* did not overrule *Lemons*, 454 Mich at 253-254, which held that CSC II was a cognate lesser offense of CSC I. Likewise, no majority in *Nyx* overruled *Cornell*, 466 Mich at 355, which held that a trial court may not instruct a jury on cognate lesser included offenses.

II. SENTENCING ISSUES

Defendant argues that the trial court errantly relied on facts that were not proven beyond a reasonable doubt in scoring the offense variables in violation of the Sixth Amendment of the United States Constitution. Defendant concedes that this argument is contrary to current law, but argued that the law was cast into doubt by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). *Alleyne* does not apply here. In that case, the U.S. Supreme Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 US at ___; S Ct at 2155. This decision overruled *Harris v United States*, 536 US 545, 568; 122 S Ct 2406; 153 L Ed 2d 524 (2002), in which the Court held that only factors that increase the maximum, as opposed to the minimum, sentence must be proved to a factfinder beyond a reasonable doubt. Thus, the *Alleyne* Court reinstated *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), which held that other than facts regarding a defendant's prior convictions, any fact that increases the penalty for a crime beyond the prescribed statutory minimum or maximum must be submitted to the jury and proven beyond a reasonable doubt. However, the *Alleyne* Court made clear that its ruling "does not mean that any fact that influences judicial discretion must be found by a jury." *Alleyne*, 570 US at ___; 133 S Ct at 2163. The Court explained that it has "long recognized that broad sentencing discretion, informed by judicial fact[-]finding, does not violate the Sixth Amendment." *Id.*

For these reasons, our Court just recently held that the holding of *Alleyne* does not apply to judicial fact-finding that occurs in setting a minimum sentence under the sentencing guidelines. See *People v Herron*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 309320, issued December 12, 2013). Accordingly, the judicial fact-finding involved in scoring the OVs did not violate defendant's rights under the Fifth and Sixth Amendments to the U.S. Constitution.

Defendant argues that the trial court erred in scoring OV 10, exploitation of a victim's vulnerability, at 10 points. MCL 777.40(1). OV 10 is scored at 10 points where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). OV 10 is scored at five points where "[t]he offender exploited a victim by his or her difference in size or

strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). OV 10 is scored zero points if the vulnerability of a victim was not exploited. MCL 777.40(1)(d). "The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). According to MCL 777.40(3)(b), exploitation occurs where defendant acts "to manipulate a victim for selfish or unethical purposes."

Here, defendant—who was 18—knew complainant's age, which was 15, when he sexually assaulted her. The differences in age could allow the trial court to properly determine that defendant exploited the victim's youth. See *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006) (quotation marks and citation omitted) (affirming a score of 10 points under OV 10 and explaining that "where complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim's youth in committing the sexual assault.").[4] Hence, because the record shows the differences in the ages of defendant and the victim, and because defendant used his size and strength differential to accomplish the penile penetration on the victim (who expressly withheld consent and who was statutorily incapable of consent), the trial court did not err in finding that defendant exploited the victim's youth, and in scoring 10 points for OV 10.

Defendant argues that OV 19 was incorrectly scored at 10 points because there was no evidence that defendant interfered with the administration of justice. OV 19, MCL 777.49(c), requires that the sentencing court assess 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." The factors considered in OV 19 include "events that almost always occur *after* the charged offense has been completed." *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). "Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts." *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010), citing *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004).

Here, the trial court scored OV 19 at 10 points because the bedding from the area where the sexual assault occurred was laundered just prior to the execution of a search warrant, and

[4] Defendant's reliance upon the order issued in *People v Taylor*, 486 Mich 904-905; 780 NW2d 833 (2010), is misplaced. For one, the Court of Appeals dissent adopted by the *Taylor* Court was not sufficiently detailed to allow us to rely on the order as precedent. See *DeFrain v State Farm Mutual Auto Ins Co.*, 491 Mich 359, 369; 817 NW2d 504 (2012). Second, even if it was, the Court reversed the 10 point score of OV 10 based on a finding by the partial dissent in the Court of Appeals that "[t]he mere fact that the victim was 16 years old is insufficient to score this variable and the record does not support a finding that defendant 'exploited the victim's youth[.]'" *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No. 284983) (SHAPIRO, J., dissenting in part), unpub op at 1. Here, it is not just the age of the victim alone, but as in *Johnson*, it is the age of the victim and the defendant that allowed the trial court to score 10 points for exploiting the victim's youth.

defendant could not locate his cell phone. However, there was no evidence that defendant participated in laundering the bedding or asked for the bedding to be laundered. The PSIR reports that defendant's mother told the police that she was washing the bedding. However, MCL 777.49(c) requires that "*the offender*" interfere with the administration of justice, rather than defendant's family.

A defendant's attempt to hide or dispose of evidence can constitute attempts to interfere with the administration of justice. *Ericksen*, 288 Mich App at 204. Defendant's cell phone may have contained a text message to the complainant's cousin apologizing for violating the cousin's trust by becoming involved with complainant. The investigating detective testified that defendant told him he lost his cell phone the morning before the search warrant was executed, and the cell phone was never recovered. However, it was not demonstrated by a preponderance that defendant intentionally withheld his cell phone. The inference that defendant intentionally hid the evidence by lying about losing it was not sufficient to score OV 19. OV 19 should be scored at zero points.

Resentencing is not, however, required where a scoring error does not alter the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). It is harmless error where reduction of an OV score would not alter the total OV score "so as to change the level at which defendant was ultimately placed in calculating the guidelines' range." *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Here, defendant's total OV score of 90 resulted in a minimum sentence of 36 to 60 months because a total OV score in excess of 75 resulted in an OV level of VI. MCL 777.63. Subtracting 10 OV points due to the error in scoring OV 19 results in a continued score of OV level VI, total score 75 plus, and a sentence range of 36 to 60 months. MCL 777.63. Thus, remand for resentencing is not necessary.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra